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No. 92-1710

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT M. WOHLFARTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 641 prohibits the unauthorized disclosure of confidential government information generated in connection with a competitive defense procurement.

2. Whether wiretap evidence involving conversations between petitioner and his wife should have been suppressed when the conversations did not contain privileged communications.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is not reported, but the judgment is noted at 985 F.2d 554 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1993. The petition for a writ of certiorari was filed on April 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of theft of government property, in violation of 18 U.S.C. 641.[1] He was sentenced to two years' imprisonment, all but four months of which were suspended in favor of probation, and was fined $10,000. The court of appeals affirmed. Pet. App. 1-16.

1. The evidence at trial showed that petitioner, a patent attorney for the United States Navy's Strategic Systems Program Office (SSP), revealed confidential information on bids for a Navy procurement contract to the Northrop Corporation. Two Federal Acquisition Regulations (FARs), 48 C.F.R. 5.401 and 15.413-1, prohibit government employees from releasing price information during the procurement process. SSP also has a standard practice not to release the price of any bid before award of a contract. Once a contract is awarded, procurement officers may inform a losing bidder about the weak points in the company's bid, but procurement officers may not tell a losing bidder the prices proposed by other losing companies or the evaluation scores and rankings assigned to the competing proposals by a Technical Proposal Evaluation Panel. Pet. App. 3-4.

In 1986 SSP was purchasing Pendulous Integrated Gyroscopic Accelerometers, known as 10-PIGAs, for Trident submarines from Honeywell. The Navy decided to obtain a second source for those items through a competitive procurement. Petitioner was responsible for determining the patent clauses to be used in the contract expected to result from the bidding competition. Pet. App. 3.

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[1] He was acquitted of conspiring to defraud the United States (18 U.S.C. 371) and two counts of receiving bribes (18 U.S.C. 201). Pet. App. 2.

In August 1986, SSP issued a request for proposals to the industry. In November 1986, Northrop and three competitors submitted proposals. The government's Technical Proposal Evaluation Panel reviewed the technical portions of the bids, while the contracting officer and his negotiator reviewed the cost or price portions of the proposals. Pet. App. 3-4; Gov't C.A. Br. 3-4.

After the 10-PIGA procurement process had begun, but before any proposals were submitted, petitioner contacted Robert Ziernicki, Northrop's vice-president for business development, and suggested that Ziernicki hire William Parkin to assist in the procurement. Parkin, a former Navy procurement officer, was a private consultant who advised defense contractors on how to obtain Navy contracts. Petitioner's wife was also Parkin's secretary. Northrop hired Parkin to obtain procurement information. Pet. App. 3-4. Parkin informed petitioner that Northrop had hired him. Gov't C.A. Br. 6.

Shortly before the 10-PIGA contract was awarded, Parkin contacted Mark Sigurski, Northrop's vice-president for business development, and provided him with information that Parkin had obtained from petitioner. Parkin reported that Northrop was about to lose the bid to Litton. Parkin also provided Northrop's bid price and the prices submitted by its competitors. Sigurski and Ziernicki later testified that in their 25 and 10 years' experience, respectively, of seeking procurement contracts, they had never before received competitors' prices during the procurement competition. Pet. App. 4-5; Gov't C.A. Br. 6.

Although Northrop declined Parkin's suggestion to submit a new bid in order to get back into the competition, Northrop asked Parkin for a written report on the procurement procedure. Parkin in turn asked petitioner for the necessary information for that report.

Petitioner provided not only the price figures for each competitor, but also the technical evaluation rankings and scores and other source selection information. Parkin finalized the report and gave it to Northrop. He received $12,500 from Northrop for his work for the company. Pet. App. 5.

2. On appeal, petitioner argued that 18 U.S.C. 641 does not apply to the disclosure of government information unless the disclosure is prohibited by statute or regulation. The court of appeals held that the FARs clearly prohibited disclosure, as did the longstanding government practice of keeping price information confidential. The court also noted that petitioner had acknowledged that he was not authorized tc disclose the information before the contract's award. Accordingly, the court held that the information disclosed by petitioner "was clearly within the reach of 18 U.S.C. § 641." Pet. App. 8. The court also held that the competitive bid information had "considerable value to the United States and to competing companies." *Ibid.*

The court of appeals also rejected petitioner's challenge to the admission of certain wiretap evidence. Although petitioner did not contend that any conversation played at trial involved privileged communications, he argued that the government's failure to minimize conversations between him and his wife required suppression of all the wiretaps. The court of appeals held that the district court did not abuse its discretion in finding that the government had taken adequate steps to minimize the interception of privileged conversations. In any event, the court of appeals noted that the conversations played at trial involved petitioner's wife in her role as Parkin's secretary and thus

did not involve privileged marital communications.[2] Pet. App. 14-15.

ARGUMENT

1. Petitioner contends (Pet. 12-23) that Section 641 does not apply to intangible information because it is not a "thing of value" that can be converted within the meaning of the statute. He also argues that the courts of appeals are divided on this question. Those contentions lack merit and do not warrant review.[3]

a. Section 641 punishes the knowing conversion of any "thing of value" of the United States. 18 U.S.C. 641. The phrase "thing of value" readily encompasses intangible property, such as confidential information. That interpretation accords with the statute's purpose to provide comprehensive protection to the government's property rights. As this Court has noted, "[t]he history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Morissette* v. *United States*, 342 U.S. 246, 269 n.28 (1952); see also *Bell* v. *United States*, 462 U.S. 356, 360 (1983) (the phrase "thing of value" in 18 U.S.C.

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[2] The court of appeals also rejected petitioner's arguments that the evidence was insufficient to support his conviction, that the trial court's instructions to the jury were flawed, and that certain testimony was improperly admitted. Pet. App. 9-15. Petitioner does not renew those claims in this Court.

[3] The Court recently denied certiorari in a case raising the same claims, *United States* v. *McAusland*, 979 F.2d 970 (4th Cir. 1992), cert. denied, 113 S. Ct. 1642 (1993), and there is no reason for a different result here.

2113(b) encompasses intangible property and "is thus broader than common law larceny").[4]

There is no merit to petitioner's claim (Pet. 20-23) that the court of appeals' decision impermissibly delegates to individual Executive Branch officials the determination of when information has been conveyed "without authority." Petitioner relies on cases in which the Court determined that a government official was given too much discretion in determining whether conduct was criminal. See, *e.g.*, *Lovell* v. *City of Griffin*, 303 U.S. 444, 451-452 (1938) (stating that making the distribution of literature a nuisance unless approved by the city manager violates the First Amendment); *Niemotko* v. *Maryland*, 340 U.S. 268, 271-272 (1951) (absence of standards in ordinance that allows city officials to deny park permits violates the First Amendment). In this case, however, petitioner's liability rests on violations of published regulations and established agency practice, not on a single official's discretionary decision. Con-

[4] Petitioner contends (Pet. 16-20) that the court of appeals extended Section 641 to encompass procurement information in which the government lacks a property interest. The court of appeals did not so hold. To the contrary, it stated, in reliance on *United States* v. *Fowler*, 932 F.2d 306 (4th Cir. 1991), that Section 641 applies to government information because "information is a species of property and a thing of value." Pet. App. 8. There is no doubt that the government has a property interest in confidential pricing information relating to an ongoing procurement. *Ibid.*; see *Carpenter* v. *United States*, 484 U.S. 19, 26 (1987) ("[c]onfidential business information has long been recognized as property"). Accordingly, this case presents no conflict with the decisions that petitioner characterizes (Pet. 18) as holding that "only the *property* of the United States may constitute a 'thing of value.'" And, in any event, petitioner did not argue in the court of appeals that confidential information is not a "thing of value" under Section 641, and he is precluded from raising that claim here for the first time. See Pet. C.A. Br. 16-32.

trary to petitioner's suggestion (Pet. 22), the court of appeals did not hold that individual officials possess unguided discretion to determine "which disclosures are wrongful and which disclosures should be prosecuted." Rather, the court specifically noted (Pet. App. 8) that the proof of petitioner's lack of authority to release the information rested on the FARs that specifically prohibited disclosure, on the SSP's longstanding practice to forbid such disclosure prior to the award of a contract, and on petitioner's own acknowledgement that he was prohibited from disclosing price information before a contract was awarded.[5]

b. The courts of appeals have repeatedly upheld convictions under Section 641 for the wrongful acquisition or dissemination of government information. See *United States* v. *Fowler*, 932 F.2d 306, 309-310 (4th Cir. 1991) (upholding Section 641 conviction of a defendant who misused information obtained from copies of classified documents; court rejected the argument that information in a document is not a "thing of value" under Section 641); *United States* v. *Barger*, 931 F.2d 359, 368-369 (6th Cir. 1991) (upholding Section 641 conviction of a defendant who obtained a DEA manual relating to a rival motorcycle gang; "[c]learly, the value of the * * * manual is in the information contained

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[5] For example, 48 C.F.R. 5.401(b) provides that "[c]ontracting officers may make available maximum information to the public, *except information*—* * * (2) [r]*eceived in confidence from an offeror*" (emphasis added). Subsection (c) of that regulation states that it applies to "all Government personnel who participate directly or indirectly in any stage of the acquisition cycle." Similarly, FAR 15.413-1(a) prohibits release of the information contained in a proposal after its receipt by the government. 48 C.F.R. 15.413-1(a). Moreover, Litton's contract proposal was marked "Source Selection Sensitive for Official Use Only," and petitioner therefore knew that it was not to be released. Pet. App. 6.

therein" and that is "enough to meet the property or 'thing of value' element of the statute"); *United States* v. *Jeter*, 775 F.2d 670, 679-682 (6th Cir. 1985) (upholding Section 641 conviction of defendant who illegally obtained and distributed carbon copies of secret grand jury documents and proceedings; court noted that "Congress' very use of the more expansive 'thing of value' rather than 'property' strongly implies coverage beyond mere tangible entities"), cert. denied, 475 U.S. 1142 (1986); *United States* v. *Girard*, 601 F.2d 69, 70-71 (2d Cir.) (upholding conviction of a former DEA agent who obtained and distributed confidential law enforcement records; "[a]lthough the content of a writing is intangible, it is nonetheless a thing of value"), cert. denied, 444 U.S. 871 (1979).

Petitioner argues (Pet. 13-14) that the Ninth Circuit has rejected the application of Section 641 to government information. The cases cited by petitioner, however, did not require the Ninth Circuit squarely to consider whether Section 641 covers the conversion of government information. In *Chappell* v. *United States*, 270 F.2d 274 (9th Cir. 1959), an Air Force sergeant was prosecuted for converting to his own use the services and labor of an airman who was ordered to paint private apartments that the sergeant owned. Based on its analysis of the common law tort of conversion, the court of appeals concluded that the airman's "services and labor" were not a "thing of value" under Section 641. 270 F.2d at 276-278. In *United States* v. *Tobias*, 836 F.2d 449, 451 (9th Cir.), cert. denied, 485 U.S. 991 (1988), the court indicated that Section 641 does not apply to "intangible goods" such as "classified information." That statement, however, was dictum, because the court held that the cryptographic cards that the defendant had converted in that case constituted "tangible property." 836 F.2d at 452. Accordingly, *Chappell* and *Tobias* did not deal with

claimed appropriations of government information and do not conflict with the court of appeals' decision in this case.[6]

In any event, the application of Section 641 to the conduct involved in this case does not present an issue of continuing importance. In 1988, Congress enacted the Office of Federal Procurement Policy Act Amendments, Pub. L. No. 100-679, § 6, 102 Stat. 4063 (Procurement Integrity Act), codified at 41 U.S.C. 423 (Supp. III 1991). That Act specifically prohibits an officer or employee of a federal agency involved in a procurement application from disclosing "directly or indirectly, to any competing contractor or any officer, employee, representative, agent or consultant of a competing contractor any proprietary or source selection information" regarding a procurement. 41 U.S.C. 423(j)(2) (Supp. III 1991). Section 423(p)(6) defines "proprietary information" to include both "information contained in a bid or proposal" and "cost or pricing data." Section 423(p)(7) defines "source selection information" as *inter alia* "information determined by the head of the agency or the contracting officer to be information * * * the disclosure of which to a competing contractor would jeopardize the integrity or successful completion of the procurement concerned" and that is required to be kept secure in order to prevent disclosure. Because in future cases government employees like petitioner can be prosecuted under the Procurement Integrity Act for revealing information to a bidder about its competitors' bids and the government's

[6] Petitioner also relies (Pet. 14) on *United States* v. *Hulberg*, 953 F.2d 1389 (9th Cir. 1992) (Table). Quite apart from the fact that that decision is not published and does not constitute precedent in the Ninth Circuit, see 9th Cir. Local R. 36-3, it is distinguishable. *Hulberg* upheld a conviction under Section 641 for appropriating stolen government photocopies; it did not to involve a conviction for appropriating information.

internal procurement processes, there is no need for this Court to consider the question whether the same conduct would independently violate Section 641.

2. Petitioner also contends (Pet. 23-28) that wiretapped conversations between himself and his wife, intercepted over Parkin's telephone, should not have been introduced into evidence. Petitioner asserts that, before the interceptions were made, the government had no good faith basis to suspect him and his wife of complicity in criminal activity. The courts below correctly rejected that factbound claim, and further review is not warranted.

When petitioner moved to suppress the wiretap evidence prior to trial, the district court reviewed the intercepted conversations and found that the government had not engaged in a pattern of intercepting privileged calls. Gov't C.A. Br. 32. That finding rested in part on an FBI agent's affidavit that before any conversations between petitioner and his wife were intercepted, petitioner had been identified as a Navy employee who was passing procurement information to Parkin and that petitioner's wife worked as Parkin's secretary. *Id.* at 33. The agent also advised the court that monitoring agents were directed to minimize privileged spousal communications, but that when petitioner's wife was acting as Parkin's secretary, her conversations were not privileged.[7] *Ibid.*

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[7] The agent further summarized the monitoring and, where applicable, the efforts at minimization of the intercepted conversations between petitioner and his wife. Gov't C.A. Br. 34. The agent's affidavit showed that 160 calls were intercepted between petitioner and his wife in the 14 months that the wiretaps were in place. Of those calls, 59 were minimized within the first 30 seconds, and another 20 within the first minute. Of the calls that were not minimized, 26 were less than 30 seconds in length, and 16 were concluded in less than a minute. *Ibid.*

Contrary to petitioner's claim, the government had a good faith basis for intercepting the conversations between petitioner and his wife when she was working at Parkin's office. First, the government had reason to believe that petitioner was passing confidential procurement information to Parkin. Second, since petitioner's wife was working as Parkin's secretary, she was functioning in that role, rather than in the role of petitioner's spouse, when she took his calls at Parkin's office. Pet. App. 15. Petitioner's reliance on *United States* v. *DePalma*, 461 F. Supp. 800, 821 (S.D.N.Y. 1978), and *United States* v. *Shakur*, 560 F. Supp. 318, 326 (S.D. N.Y. 1983), is misplaced. Those cases state only that the government should terminate its interception of privileged communications once it realizes that the parties are engaged in such communications. Nothing in those cases suggests that the government may not continue to listen to conversations that do not implicate the privilege or that involve criminal activity.

Petitioner is not helped by his reliance (Pet. 23-24) on *United States* v. *Zolin*, 491 U.S. 554 (1989). In that case, the Court stated that, when the government requests a trial court to review allegedly privileged materials in camera to determine the applicability of the crime-fraud exception to the attorney-client privilege, the government must make "a showing of a factual basis adequate to support a good faith belief by a reasonable person" that the review may disclose evidence indicating that the exception applies. *Id.* at 572. The Court noted that trial courts have flexibility in determining whether to conduct an in camera review and that the "threshold" for doing so "need not be a stringent one." *Ibid. Zolin* did not concern the threshold showing for engaging in electronic surveillance of arguably privileged communications. Even if its "good faith belief" standard were applicable in this context, however, the facts

support the legitimacy of the government's actions, as discussed above.

In any event, none of the conversations introduced into evidence involved any arguably privileged communications. Pet. App. 14. Instead, in the conversations introduced at trial petitioner periodically asked his wife whether Northrop had paid Parkin, and petitioner complained that he wanted his money from Parkin. Gov't C.A. Br. 36 n.11. As such, petitioner has no grounds for complaint about the wiretap evidence that was introduced at trial.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1993

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[8] See *United States* v. *Cox*, 462 F.2d 1293, 1301 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974); see also *United States* v. *Hoffman*, 832 F.2d 1299, 1309 (1st Cir. 1987); *United States* v. *McGuinness*, 764 F. Supp. 888, 900-901 (S.D.N.Y. 1991); *United States* v. *Shakur*, 560 F. Supp. at 326. Cf. *Scott* v. *United States*, 436 U.S. 128, 135 n.10 (1978) (noting, but not reaching, the argument that the wiretap statute "requires suppression of only those conversations which were illegally intercepted, not suppression of all the intercepted conversations").